The Great Excavation: "Discovering" Navajo Tribal Peacemaking Within the Anglo-American Family System

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I. INTRODUCTION

"Most new discoveries are suddenly-seen things that were always there."[1]

The Anglo-American adversarial system has been characterized as unproductive and dissatisfying, leaving countless academics and legal professionals continuously searching for "new discoveries" that may provide disputants with an alternative to the adversarial model.[2] Among these new discoveries are various alternative dispute resolution (ADR) programs that, unfortunately, come with their own set of flaws.[3] The archaeologist,

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[1] SUSANNE K. LANGER, SOMETHING MORE 32 (1998).

[2] *See* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 2–3 (1993) (expressing the need for alternatives to the adversarial system). This need for an alternative probably was expressed best by Voltaire when he stated, "I was ruined but twice in my life: Once when I lost a lawsuit. Once when I won a lawsuit." Steve C. Briggs, *ADR in Colorado: Past and Present*, COLO. LAW., June 1997, at 103, 107 (quoting statement by the French philosopher Voltaire).

[3] *See* Janet Reno, *Reno to Lawyers: Consider ADR*, 53 DISP. RESOL. J. 48, 48 (1998). United States Attorney General Janet Reno devoted Law Day, May 1, 1998, to promoting alternative dispute resolution programs. *See id.* The field of alternative dispute resolution currently is used to settle all types of litigation, such as tort, employment, environmental, tax, civil rights, and administrative law cases. *See id.*

Moreover, on October 30, 1998, President Clinton signed the Alternative Dispute Resolution Act of 1998, which acted as a catalyst of change and encouraged critical thinking in alternative dispute resolution programs. *See generally* Alternative Dispute Resolution Act of 1998, 28 U.S.C.A. § 651 (West Supp. 1999). This Act amended 28 U.S.C. § 651 to require each federal district court to authorize the use of alternative dispute resolution programs in all civil actions. *See id.* § 651(b). Furthermore, each district court was given the authority to devise and implement its own alternative dispute resolution programs. *See id.* The Alternative Dispute Resolution Act also gives the Federal Judicial Center and the Administrative Office of the United States Courts the authority to assist the district courts in the establishment and improvement of alternative dispute resolution programs. *See id.* § 651(f). However, improvements also are urged on the state level as well. *See* Thomas A. Kochran, *Labor Policy for the Twenty-First Century*, 1 U. PA. J. LAB. & EMP. L. 117, 120 (1998). *See generally* Gail Bingham, *Applying ADR Techniques to Environmental Matters*, 56 ALI-ABA COURSE OF STUDY MATERIALS: ENVTL. L. 265, Feb. 1998.

however, would suggest a different strategy for improving and understanding the future of Anglo-American justice—through an excavation.[4]

Accordingly, this Note will embark on an archaeological dig to uncover evidence from a form of tribal justice still in existence today. The artifacts found during the excavation are hypothesized to serve as a model for improving Anglo-American child custody determinations in a nonadversarial context. Part II will begin the journey by selecting an excavation site that intrigues the U.S. legal system—the Navajo Peacemaker Court. Part III will commence the dig and prudently observe the characteristics of the Navajo Peacemaker Court that surface. Part IV will test the hypothesis and show, contrary to the belief of many critics, that many fundamental characteristics of peacemaking may be, or already are, incorporated in Anglo-American family dispute resolution programs. Finally, Part V will recommend peacemaking guidelines for improving Anglo-American child custody determinations, followed by conclusory remarks in Part VI.

II. THE SELECTION OF THE EXCAVATION SITE: THE NAVAJO PEACEMAKER COURT

A. *Local Legend Speaks*

The first step in an archaeological dig is the selection of an excavation site to begin the venture.[5] Archaeologists select their excavation sites based on history, local legend, and occasionally, just a lucky guess.[6] However, the selection of the Navajo Peacemaker Court was based on more than a mere

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[4] "Archaeology," from the Greek *arkhaiologia*, is "[t]he systematic recovery and study of material evidence . . . remaining from past human life and culture." AMERICAN HERITAGE DICTIONARY 124 (1982) (defining the term "archaeology"). The goal of an excavation is to examine the process of cultural change. *See* Anita Walker, *Principles of Excavation*, *in* A MANUAL OF FIELD EXCAVATION 1, 2 (William G. Dever & H. Darrell Lance eds., 1978). Further, an excavation recovers evidence located deep within the earth, where documents simply cannot reach. *See* PHILIP BARKER, TECHNIQUES OF ARCHAEOLOGICAL EXCAVATION 13 (3d ed. 1993). It is through the continual re-examination of this evidence that these embedded objects may serve as guidance to improve situations in the future. *See id.* at 14. However, it is nearly impossible to excavate an area unless specific goals and procedures aimed at the hypothesis are defined before anyone on the site ever lifts a trowel—"he tends to find what he knows to look for." *Id.*

[5] *See* Cindy Alberts Carson, *Laser Bones: Copyright Issues Raised by the Use of Information Technology in Archaeology*, 10 HARV. J.L. & TECH. 281, 283 (1997).

[6] *See id.*

notion.[7] Rather, the interest in peacemaking is based on what may be described best as a local legend that has evolved through time.[8]

Although many scholars and legal professionals affiliated with the American courts once viewed tribal justice as lawless and near-anarchy, there is recent intrigue in the area of tribal peacemaking.[9] In fact, local legend no longer ignores or condemns tribal peacemaking.[10] Rather, respected members of the United States legal system are giving outward praise to the peacemaking courts, and they embrace the idea of cultural borrowing.[11] Expressing support, Justice Sandra Day O'Connor recently wrote:

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[7] This Note will use the Navajo Peacemaker Court as the exclusive model. However, peacemaking is also practiced by the Zuni as well as other indigenous groups in the Pacific Northwest, the Plains, the Southeast, Alaska, and Hawaii. *See* Robert Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 258–59 (1997). Nonetheless, the Navajo Peacemaker Court has acquired the most notoriety due to both the increased caseload and the prominent spokespersons from the Navajo Nation. *See* Louis Sahagun, *Banishment Tests Not Only Criminals but Their Tribe as Well*, L.A. TIMES, June 21, 1995, at A5. *See generally* Philmer Bluehouse & James W. Zion, Hozhooji Naat'aanii*: The Navajo Justice and Harmony Ceremony*, 10 MEDIATION Q. 327 (1993) (educating the public on Navajo tradition and justice).

[8] Peacemaking was defined by the Tribal Peacemaking Conference as "[a]ny system of dispute resolution used within a Native American community which utilizes non-adversarial strategies, incorporates some traditional or customary approaches and the aim of which is conciliation and the restoration of peace and harmony." Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 825 (1996) (quoting NATIVE AM. RESEARCH CTR., OKLA. CITY U. SCH. OF LAW, TRIBAL PEACEMAKING CONF. 1 (1993)); *see also* Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1003 (1997).

[9] *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1409–15 (1997). It was the absence of written law and court procedures that led the colonists to conclude that those on aboriginal territory lived in the absence of laws and justice. *See* Porter, *supra* note 7, at 253.

[10] *Compare* Goldberg-Ambrose, *supra* note 9, at 1409–15 (discussing the frustration and disapproval with tribal justice), *with* Robert D. Garrett, *Mediation in Native America*, DISP. RESOL. J., Mar. 1994, at 38, 39 (praising tribal justice).

[11] *See infra* notes 12–17. Further, peacemaking was defined by the Tribal Peacemaking Conference as "[a]ny system of dispute resolution used within a Native American community which utilizes non-adversarial strategies, incorporates some traditional or customary approaches and the aim of which is conciliation and the restoration of peace and harmony." Bernard, *supra* note 8, at 825; *see also* Goldberg, *supra* note 8, at 1003.

> In place of the Anglo-American system's emphasis on punishment and deterrence, with a "win-lose" approach that often drives parties to adopt extreme adversarial positions, some tribal judicial systems seek to achieve a restorative justice, with emphasis on restitution rather than retribution and on keeping harmonious relations among the members of their community. Tribal courts may employ inclusive discussion and creative problem-solving as alternatives to conventional adversarial processes. These new methods have much to teach the other court systems operating in the United States.[12]

Justice O'Connor has articulated further that "the Indian tribal courts' development of further methods of dispute resolution will provide a model from which the Federal and State courts can benefit as they seek to encompass alternatives to the Anglo-American adversarial model."[13]

In addition to endorsement from a United States Supreme Court Justice, tribal peacemaking also has been offered as a model by United States Attorney General Janet Reno.[14] In a speech discussing the needs of crime victims, Reno stated that "[t]he victim does not feel whole until there is some resolution to the bitterness . . . inflicted by the crime. The tribal system heals rather than determining guilt. Community-based peacemaking, according to tribal tradition, seeks to resolve problems instead of processing cases in lengthy adversarial proceedings."[15] Further, many legal scholars also add to the local legend by speaking in support of tribal peacemaking.[16] The President of the American Bar Association has stated:

> [T]he Navajo goal of preserving the community and seeking peace is one our own system of justice must embrace.
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> . . . .
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> The medicine man exhorts us to remember that we are all part of the same Mother Earth, that we must live with each other in peace and in harmony. His blessing bears an important message for lawyers and for our legal system.

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[12] Sandra Day O'Connor, *Tribal Courts Are Vital Part of U.S. Justice System*, ANCHORAGE DAILY NEWS, Mar. 20, 1997, at C8.

[13] Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 9 TRIBAL CT. REC. 12, 14 (1996).

[14] *See* Janet Reno, *Reno Speaks at Indian Crime Forum*, SAN DIEGO UNION-TRIB., Jan. 25, 1997, at B2.

[15] *Id.*

[16] *See* Goldberg, *supra* note 8, at 1006.

> Lawyers must embrace the role of peacemaker and work toward creating harmony . . . .[17]

In addition, stressing education, an academic at an Indian law symposium noted that:

> [i]t is important that non-Indians learn about the tribal customary law, if for no other reason than to prevent the Anglo-American world from prescribing for tribal societies how their laws should be made. The innovative power of tribal jurisprudence, which long ago discovered alternative dispute resolution methods, can continue to provide direct benefit to non-Indian sovereigns and their citizens. Enriching . . . potential exists; it is only a matter of whether the non-Indian world is ready to learn and appreciate the customary wisdom in tribal common law.[18]

Thus, local legend has spoken from a wide array of sources admiring the unique nature of the Navajo Peacemaker Court. Historically, it was also these unique characteristics of Indian law that caught the attention of non-Indians; ironically, the opinions have changed. Thus, local legend will be discussed further with respect to the Navajo history of tribal justice.

B. *"New Discoveries"*

Navajo systems of tribal justice have not always been welcomed by non-Indians.[19] For centuries, the Navajos located in what is now Arizona, New Mexico, and Utah had their own traditional methods of justice.[20] In 1892, the U.S. government imposed methods of adjudication on the Native Americans with the passage of the Navajo Court of Indian Offenses (1892–1959) and the Bureau of Indian Affairs (BIA) Law and Order Code (1934).[21]

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[17] Roberta Cooper Ramo, *Lawyers as Peacemakers: Our Navajo Peers Could Teach Us a Thing or Two About Conflict Resolution*, A.B.A. J., Dec. 1995, at 6, 6; *see also* Bernard, *supra* note 8, at 822 ("Peacemaking holds special promise for those still searching for ADR models that might not only resolve immediate legal disputes, but aid in healing human relationships."); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 261 (1994) (noting that tribal courts are "the laboratories for new concepts that can benefit the majority judicial system").

[18] Valencia-Weber, *supra* note 17, at 263.

[19] *See* Bluehouse & Zion, *supra* note 7, at 328.

[20] *See id.* at 327. Furthermore, the Navajo Nation is America's largest Indian nation with a population of over 220,000 people and a land base almost the size of Ireland. *See* WEBSTER'S NEW WORLD ENCYCLOPEDIA 786 (1992).

[21] *See* Bluehouse & Zion, *supra* note 7, at 328.

These imposed methods of adjudication utilized power and coercion in the courtroom that were entirely "repugnant to Navajo morals."[22] A century later, the Courts of the Navajo Nation sought to revive some of the traditional ways and resolve their own problems without adjudication—without interference.[23]

Thereafter, in 1982, during the height of the enthusiasm for ADR programs, the Navajo Nation Conference created the Navajo Peacemaker Court.[24] A theoretical explanation of the Peacemaker Court was used to persuade Navajo chapters to adopt this system of justice formally, and it provides a context to educate non-Indians on the tenets of the Peacemaker Court.[25] Thus, according to the advocates, the Peacemaker Court is best illustrated as a circle representing tradition, surrounded by a square with the four points reflecting the distinct elements of the court.[26] These four elements forming the Peacemaker Court are as follows: structure,[27] protection,[28] choice, and enforcement.[29]

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[22] *Id.* Moreover, the contrast between the two approaches to justice systems was best summarized by an Ojibway Elder: "If one follows respect, the conclusion is that no [justice] system is more valid than the other. But the Euro-Candian validity is forced upon our ways. The Euro-Candians are breaking our laws day in and day out, as they accuse us of breaking theirs." Rupert Ross, *Restorative Justice: Exploring the Aboriginal Paradigm*, 59 SASK. L. REV. 431, 432 (1995) (alterations in original) (quoting Ojibway elder speaking at a 1993 justice conference).

[23] *See* Bluehouse & Zion, *supra* note 7, at 327; *see also* Valencia-Weber, *supra* note 17, at 263.

[24] *See* Bluehouse & Zion, *supra* note 7, at 328. Currently, there are over 250 peacemakers in the Navajo Nation. *See* James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 80 (1997).

[25] *See* James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 100 (1983).

[26] *See id.* at 100 n.40. "Navajo tradition gives great significance to the concept of four elements." *Id.* at 100 n.39. "There are four sacred directions with four sacred mountains. The coincidence of this tradition with the four elements comprising the theoretical structure of the court was later found helpful in taking the Peacemaker Court idea to local leaders." *Id.*

[27] The concept of Navajo tradition is the basis of the first element of structure. *See id.* at 100. Through the adoption of the Peacemaker Court, tradition was given the status of a formalized court system. *See id.* Moreover, the Peacemaker Court is recognized by the Navajo government as a division of the Navajo courts. *See id.*

[28] The second element of protection is carefully intertwined with the third element of choice. The Navajo tribal court continues to oversee the peacemaker court in a supervisory manner, thus establishing protection. *See id.* This allows parties unsuccessful with a peacemaking session to resign from peacemaking and look to the tribal court for

Moreover, the Navajo Peacemaker Court embodies a unique system of ADR, comprised of goals and methods of justice traditionally more successful to the Navajos than the imposed methods of adjudication.[30] Actually, Indian Nation leaders insist that tribal peacemaking is their original dispute resolution mechanism because of its foundation on traditional Indian law.[31] In fact, through the establishment of the Peacemaker Court, the Navajos made a conscious effort to attempt to return to their traditional form of justice.[32] The importance of this return and the basis for the fear of future interference can be seen through a comparison of the foundation of Anglo-American adjudication and the Navajo Peacemaker Court, and that is where this excavation shall begin.[33]

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relief. *See* Bernard, *supra* note 8, at 831. Moreover, individuals are given the choice to cooperate with the peacemaking process or return to the adversary system of the court. *See* Zion, *supra* note 25, at 101.

[29] Furthermore, the element of enforcement brought a sense of legitimacy to Navajo custom. *See* Zion, *supra* note 25, at 101. The results of the Peacemaking session are recorded in the form of a judgment in the local district court. *See id.* The judgment carries the same authority as any other judgment rendered in the Navajo courts. *See id.* Enforcement is also similar to adjudicatory judgments, giving the police the power to enforce the community decision. *See id.*

[30] *See* Bluehouse & Zion, *supra* note 7, at 328. Typically, the Navajo Nation faces such social problems in their Peacemaker Courts as alcohol-related crimes, family violence, child abuse and neglect, and gang vandalism. *See* Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Penal Code, and the Police Idea in American Indian Policy*, *in* AMERICAN INDIANS AND THE LAW 25, 53 (Lawrence Rosen ed., 1976) (estimating that 70% of the offenses brought in tribal courts are alcohol related); James W. Zion & Elsie B. Zion, Hozho' Sokee'—*Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 412, 416 (1993); *see also* Robert Yazzie & James W. Zion, *'Slay the Monsters': Peacemaker Court and Violence Control Plans for the Navajo Nation*, *in* POPULAR JUSTICE AND COMMUNITY REGENERATION: PATHWAYS OF INDIGENOUS REFORM 67, 67, 73–75 (Kayleen M. Hazlehurst ed., 1995).

[31] *See* Zion & Yazzie, *supra* note 24, at 55–56. Actually, mediation has existed in Native American cultures for hundreds of years. *See* Robert D. Garrett, *Mediation in Native America*, DISP. RESOL. J., Mar. 1994, at 38, 39.

[32] *See* Bluehouse & Zion, *supra* note 7, at 327–28. Associate Justice Raymond D. Austin of the Navajo Nation Supreme Court refers to this process of returning to traditional Indian law as going "back to the future." Raymond D. Austin, *ADR and the Navajo Peacemaker Court*, JUDGES' J., Spring 1993, at 8, 8.

[33] There is great fear that the Anglo-American alternative dispute resolution system may be forced on Indian nations, just as adjudication methods were coerced decades ago. *See* Zion & Yazzie, *supra* note 24, at 56. Repeatedly, ADR experts have visited the Navajo Nation and offered to teach the Navajos Anglo-American ADR methods. *See id.* at 72. Frightened that history would repeat itself, the Navajos declined. *See id.*

III. COMMENCEMENT OF THE ARCHAEOLOGICAL DIG—THE CHARACTERISTICS OF THE NAVAJO PEACEMAKER COURT

Excavators must respect the variety of evidence uncovered in the archaeological dig and be careful not to overlook anything that may, at first glance, fall short of the expectations of their hypothesis.[34] Sometimes it is the unsuspecting fossil embedded deep within the earth that, with a little polishing, becomes the long awaited ancient artifact.[35] Thus, this Note seeks to examine the characteristics of Navajo peacemaking through the unbiased eye but with the selective interest in applying them to Anglo-American justice. Attention will be directed to each characteristic uncovered throughout the excavation, no matter how unconventional to Anglo-American justice it may appear superficially to be.

The foundation of a judicial system is built upon a common understanding of law.[36] At the commencement of the dig, it is imperative to the analysis of Navajo justice to understand that Navajos do not believe that the law is man-made.[37] Thus, unlike Anglo-American jurisprudence, the law is not defined as "a body of rules or standards of conduct promulgated or established by some authority, e.g., those standards of conduct adopted by the legislative authority of a government."[38]

In contrast, *beehaz'annii* is the Navajo word for law.[39] It translates to mean something fundamental that is absolute and exists from the beginning

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Interestingly, some of the non-Indian visitors completed the Navajo Nation's peacemaking certification training. *See id.*

[34] *See* BARKER, *supra* note 4, at 159.

[35] *See id.* at 160–61.

> There is more to seeing than meets the eyeball, and there is more to . . . observation than merely standing alert with sense organs at the ready . . . . It is all *interest-directed and context-dependent.* Attention is rarely directed to the space between the leaves of a tree. Still, consider what was involved in Robinson Crusoe's seeing a vacant space in the sand as a footprint. Our attention rests on objects and events which because of our selective interests dominate the visual field.

Id. at 275.

[36] *See* Honorable Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 175 (1994).

[37] *See id.*

[38] GILBERT'S LAW DICTIONARY 149 (1994) (defining "law").

[39] *See* Yazzie, *supra* note 36, at 175. Moreover, the Navajo language is quite precise; any translation into English is approximate.

of time.[40] The Navajos believe that "the Holy People put it there for us from the time of beginning for better thinking, planning, and guidance. It is the source of a healthy, meaningful life, and thus 'life comes from it.'"[41] Moreover, Indians sometimes explain that "all laws are written in the stars"[42] and actually use the constellations as their laws guiding such things as the practice of hunting. Thus, to the Navajo, man-made law is not true law; it must be taught to be much more than that.[43] Rather than learning the law through regulations, statutes, and cases, religious leaders profess that the law can be known only through such things as songs, prayers, and teachings.[44] Accordingly, it is when those teachings are lost that the law is broken.[45]

A. *Artifact One: Characteristics of* K'ei*—Horizontal Justice*

With completely different meanings associated with the word "law," it is not difficult to imagine the conflict between the imposed Anglo-American adjudication systems and lifetime Navajo tradition. As previously mentioned, in 1892 the Navajo Nation received the adversarial system.[46] The Navajos discuss the various differences between the two systems through the

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[40] *See id.* Further, Navajos are empiricists—people who believe that knowledge comes from experience. *See* Robert Yazzie, *"Hozho Nahasdlii"—We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 121 (1996) [hereinafter Yazzi, *We Are Now in Good Relations*]. Navajos believe that they have gone through a journey for thousands of years prior to arriving at their present state of being. *See id.* Each generation of these lives passes down the knowledge gained from experience through lessons known as "tradition." *See id.*

[41] Yazzie, *supra* note 36, at 176.

[42] Honorable Robert Yazzie, *Navajo Peacekeeping: Technology and Traditional Indian Law*, 10 ST. THOMAS L. REV. 95, 95 (1997) (citing FRANC JOHNSON NEWCOMB, NAVAJO NEIGHBORS 205 (1966)). It is imperative that laws are created to limit hunting in order to prevent extinction. *See id.* The Navajo hunting law is dictated by the formation of stars. *See id.* (citing NEWCOMB, *supra*, at 205–06)). Hunting season is regulated by the "Hunters' Constellation," just as the time to hunt mountain sheep is determined by the brightness of the constellation referred to as the "Horns." *See id.* (citing NEWCOMB, *supra*, at 206)).

[43] *See* Yazzie, *supra* note 36, at 176.

[44] *See id.* Navajos learn the law or "right ways of thinking" through prayers and ceremonies which are internalized at an unconscious level of thought and expressed through language and relationships—Western philosophy refers to this as the "conscience." *See* Yazzie, *We Are Now in Good Relations*, *supra* note 40, at 121.

[45] *See* Yazzie, *supra* note 36, at 176.

[46] *See* Bluehouse & Zion, *supra* note 7, at 327.

use of an analogy.[47] They describe the adversarial system as a "vertical system of justice"—a hierarchy of authority using both power and coercion to address conflict.[48] Ironically, to the Navajos, the parties to the dispute are given a limited role and are viewed by Navajos as having little power in the procedural aspects of the system.[49] In sum, the Navajos conclude that the adversarial model is nothing more than a win-lose game with the loser commanded to face a penalty.[50] The Honorable Robert Yazzie, Chief Justice of the Navajo Nation, has been described as seeing the results of the adversarial system "feed a sense of injustice; they represent conflict which is suppressed by force."[51]

Further, the inappropriateness of this authoritative model of justice in a Navajo community is best summarized in an ancient Navajo maxim which unambiguously warns one to "beware of powerful beings."[52] To the Navajos, this fear of people with power is more than a mere superstition.[53] Coercion from powerful beings is considered to be a severe form of witchcraft in Navajo tradition.[54] Thus, Navajos would use the phrase *shash kheyadae*—a way of expressing disapproval of something horrible—to describe the adversarial system, which has several components contrary to their belief system.[55]

Furthermore, Navajos see vertical justice as a manipulation of the truth.[56] They view the adversarial system as emphasizing the truth yet cannot understand why the individual who wishes to express his or her version of the truth entrusts this important role to an attorney.[57] Rather than

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[47] *See* Yazzie, *supra* note 36, at 177.

[48] *Id.*

[49] *See id.*

[50] *See id.* at 178; *see also* Yazzie, *We Are Now in Good Relations*, supra note 40, at 118 (explaining that "one party leaves the courtroom with his tail in the air, and the other leaves with his tail between his legs").

[51] Bernard, *supra* note 8, at 831 n.42.

[52] Yazzie, *supra* note 36, at 180.

[53] *See id.*

[54] *See id.*

[55] *See* Yazzie, *We Are Now in Good Relations*, *supra* note 40, at 120.

[56] *See* Yazzie, *supra* note 36, at 179.

[57] *See* Bluehouse & Zion, *supra* note 7, at 328. It follows that a prominent professor has wondered "how it is that a [non-Indian] 'law shaman' can declare 'the truth' based on 'lies' presented by lawyers." *Id.* (construing statement by Professor Little Bear of the University of Lethlondge to the Royal Commission of Aboriginal Peoples of Canada). Moreover, *agha'diit'aahii* denotes the Navajo word for "lawyer" and translates to mean "someone who takes away with words"—a "pushy bossyboots." Yazzie, *supra* note 42, at 101 n.53.

concentrating on what happened back in time, Navajo justice seeks to solve the problem, making the truth that is stressed in the vertical system of justice irrelevant to the healing that must occur.[58]

As will be shown, Navajo justice is best characterized as discussion, consensus, relative need, and healing.[59] The Navajos refer to it as "horizontal justice" and use the depiction of a horizontal line to portray the equality of their system.[60] At the heart of horizontal justice is the maintenance of continuous relationships and harmony with each other.[61] The word *k'e* best describes the solidarity involved in Navajo healing and justice.[62] *K'e* translates approximately as "compassion, cooperation, friendliness, unselfishness, peacefulness, and all the other positive values which create an intense, diffuse, and enduring solidarity."[63]

Visually, horizontal justice is depicted as a circle symbolizing unity—a perfect portrait of equality.[64] If the law is broken, so is the circle.[65] Healing must occur to repair the broken circle and restore the unity and solidarity of the people, thus emphasizing the continuity of relationships.[66] However, unlike vertical justice, healing and solidarity are not believed to be achieved through sanctions and punishment.[67] In fact, solidarity is considered to be a form of restorative justice;[68] solidarity provides justice by restoring good

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[58] *See* Yazzie, *supra* note 36, at 179.

[59] *See id.* at 180–81.

[60] *See id.* at 180. Furthermore, a fundamental Navajo value is the belief that there is complete equality among all people. *See* Austin, *supra* note 32, at 8. Thus, there is a high respect for an individual's freedom, which is kept in check through the concept of *k'e*, or kinship. *See id.* at 10.

[61] *See* Bluehouse & Zion, *supra* note 7, at 329.

[62] *See id.*

[63] *Id.* (making reference to GARY WITHERSPOON, NAVAJO KINSHIP AND MARRIAGE (1975)). Similarly, *k'ei* is a form of *k'e*, which is the word Navajos use to illustrate a clan system unified by *k'e*. *See id.* This type of healing is closely related to the healing that is performed by the medicine man for the sick. *See* Yazzie, *supra* note 36, at 180. Unlike adjudication, which concentrates exclusively on external factors, Navajo justice concentrates on the internal aspects of problems by getting below the surface. *See* Yazzie, *Now We Are in Good Relations*, *supra* note 40, at 124.

[64] *See* Yazzie, *supra* note 36, at 180.

[65] *See id.*

[66] *See id.*

[67] *See id.* at 181.

[68] *See id.* Restorative justice, as used in many aboriginal communities, provides for a nonstigmatizing process meant to bring the offender into an awareness of how his conduct has affected not only the victim, but the lives of others, such as the victim's and the offender's family. *See* Ross, *supra* note 22, at 434. In restorative justice, the goal of

relationships among the people and, most importantly, within oneself.[69] Thus, the first characteristic of peacemaking has surfaced—maintaining a continuity of relationships.

B. *Artifact Two:* Hozhooji Naat'aanii—*Peacemaking*

The actual peacemaking session sets out on a mission to return the parties to harmony, or to what the Navajos refer to as *hozho*.[70] The process may be invoked by making a request at the Peacemaking Division to have the dispute settled in a peacemaking session.[71] However, district court judges may refer civil and criminal cases to the Peacemaker Court as well.[72] A wide variety of cases—such as domestic violence, property damage, gang activity, fighting, disorderly conduct, driving while intoxicated, and sometimes even murder—are acceptable for peacemaking.[73] Thereafter, a member of the court staff will assign the parties to a *naat'aanii*, or peacemaker, who lives in one of the Nation's chapters.[74] Once the peacemaker is chosen, the disputing parties, the relatives of both, and the community members all are invited to attend the peacemaking session.[75] The Navajo rationale behind this extended "zone of dispute" is the belief that when one person is victimized in a community, all members of the community are affected and have a right to an opportunity to be heard.[76] Thus, the second main characteristic of peacemaking appears—inclusion of extended family in the zone of dispute.

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problem solving is left to the parties themselves in the hope that the parties will be able to develop the necessary skills to prevent or cope with similar problems themselves. *See id.* at 435.

[69] *See* Yazzie, *supra* note 36, at 181.

[70] *See id.* at 175.

[71] *See* Yazzie, *supra* note 42, at 98; *see also* Daniel L. Lowery, Comment, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992*, 18 AM. INDIAN L. REV. 379, 384 (1993).

[72] *See* Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 35 (1993). After referral, it is mandatory for Navajos to participate; however, non-Navajos may decline the referral. *See id.*

[73] *See id.* at 17–18.

[74] *See* Yazzie, *supra* note 42, at 98.

[75] *See* Yazzie, *supra* note 36, at 182. Navajo Due Process requires notice to be given to an extended group of people, but it need not be in writing. *See id.* at 182 n.43.

[76] *See id.* at 182–83.

Thereupon, the peacemaking session commences with an opening prayer used to diagnose the state of disharmony by concentrating on *k'e*.[77] Prayer encourages the parties to commit to opening themselves up to communicating the problem and the various emotions surrounding it.[78] For support, the supernatural are beckoned to aid in the restoration.[79] The supernatural help all of the souls in the zone of dispute to remain open to the healing process that will soon begin.[80]

Once the disputants recognize their relationship and the disharmony that has been created, the process of "talking things out" begins.[81] All of those who have decided to appear at the gathering will be given the opportunity to be heard.[82] Further, there are no rules of evidence, rules regarding relevance, or formalized procedures to hamper or suppress communication during this stage of "venting."[83] The Navajos remedy the problem of a possible power imbalance by allowing relatives to speak for, or in place of, the victimized, who may be in a state of vulnerability.[84] Therefore, during the stage of "talking," the issues should be ascertained, the relationships and obligations defined, and various approaches to solving the problem discussed.[85]

Furthermore, the objective of talking things out is to identify the *nayee*—literally, the "monster."[86] This monster is the hurdle which must be overcome to end the dispute; monsters are "the things that get in the way of a successful life."[87] However, in addition to targeting the central cause of the dispute, the accused also must disclose the "little monsters" that enable the

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[77] *See* Bluehouse & Zion, *supra* note 7, at 333. "It is similar to diagnosing an illness to find causes." *Id.* Next, a lecture based on the practical problem and its relationship to Navajo values will be recited by the peacemaker. *See id.* at 334.

[78] *See* Yazzie, *supra* note 42, at 98. Many of the modern religious ceremonies performed by the Navajos are a response to pressures from Anglo-Americans. *See* Zion, *supra* note 25, at 90. It is the threatening feeling of entrapment from the outside world that causes Indians to respond by emphasizing traditional goals, customs, and values. *See id.*

[79] *See* Yazzie, *supra* note 42, at 98.

[80] *See id.*

[81] *See* Yazzie, *supra* note 36, at 182.

[82] *See id.* at 182–83.

[83] *See id.*; Yazzie, *supra* note 42, at 98 (describing the next step of the peacemaking session as "venting," in which the victim is allowed to discuss both what has happened to cause this dispute and how he feels about the event). Frequently, these sessions last for several days. *See* Lieder, *supra* note 72, at 15.

[84] *See* Yazzie, *supra* note 36, at 183.

[85] *See* Austin, *supra* note 32, at 10.

[86] *See* Zion & Yazzie, *supra* note 24, at 79.

[87] Yazzie, *supra* note 42, at 97; *see also* Zion & Yazzie, *supra* note 24, at 79.

monster to be an obstacle.[88] These little monsters are more familiarly known to Americans as psychological barriers, such as denial, substance abuse, minimization, and externalization.[89]

Following the process of talking things out, the peacemaker will intervene with the next phase, known as "the lecture."[90] The peacemaker, avowed for immense wisdom, will draw from her life experience and respond to what has been revealed through the venting session.[91] The peacemaker then can teach the parties how to overcome the monsters that have brought havoc to the community.[92]

Subsequently, it is the responsibility of the community to arrive at a common plan to slay these monsters, based upon the wisdom of the group and the guidance of the peacemaker.[93] A plan is reached and agreed upon through the formulation of a group consensus.[94] The result of this consensus is an understanding of what constitutes that which the Navajos call *nalyeeh*—"a process resulting in restitution, restoration, and making a person whole for an injury."[95] Thus, the community must determine the type and quantity of *nalyeeh* needed to restore harmony.[96] Furthermore, the relatives of the wrongdoer are an integral part of this final arrangement.[97] In addition to being responsible to help pay the *nalyeeh*, it is the duty of the relatives to act as "pseudo-probation officers" by monitoring the restoration and rehabilitation process.[98] Thus, the third main characteristic of peacemaking reaches the surface—a sense of shared or collective responsibility.

In conclusion, the entire peacemaking session is presupposed by the Navajo belief that the victim is in the best position to describe the consequences of the crime, just as the offender is in the best position to

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[88] *See* Yazzie, *supra* note 42, at 98–99.

[89] *See id.* at 99.

[90] *See id.*

[91] *See* Lowery, *supra* note 71, at 385. Frequently, the peacemaker will use the skills of a leader to access ancient knowledge. *See id.*

[92] *See id.*

[93] *See* Yazzie, *supra* note 36, at 183.

[94] *See* Lieder, *supra* note 72, at 36. Reaching a mutual agreement helps lessen the perception of injustice that often plagues adjudication. *See id.* at 16.

[95] Austin, *supra* note 32, at 11; *see also* Lieder, *supra* note 72, at 16 (noting that *nalyeeh* often involves some type of payment).

[96] *See* Austin, *supra* note 32, at 11.

[97] *See id.*

[98] Zion & Yazzie, *supra* note 24, at 79–80.

explain why the crime occurred.[99] Through encouragement and support, peacemaking allows the people to resolve the problems that prey on their community through rehabilitation rather than blame and punishment.[100] Once again we see that the healing aspect of peacemaking is important to the Navajos because, as a community, the Navajos recognize that their relationships are continuous.[101] Thus, living in harmony is imperative if those relationships are meant to symbolize the unity of a circle.[102]

C. *Artifact Three: Characteristics of* Naat'aanii—*The Peacemaker*

The core of the Navajo Peacemaker Court is the Peace and Harmony Way Leader—the peacemaker.[103] The *naat'aanii* is a Navajo civil leader who acts as a guide allowing everyone to participate in the peacemaking process.[104] The *naat'aanii* is chosen by the community based upon a number of characteristics valued by the Navajos.[105] Moreover, the peacemaker is one who displays good character, integrity, and a form of knowledge that is displayed through the ability to persuade rather than coerce or command others.[106] It is important to note that neutrality is not a requirement for the peacemaker because, most importantly, the *naat'aanii* is not a decisionmaker.[107] Remember, the Navajo system of justice is aimed at the restoration of relationships and not a censure subsequent to a determination of guilt.[108] Thus, a decisionmaker is not needed.[109]

Further, respect for the peacemaker is what directs the process to success.[110] As a guide, it is the responsibility of the *naat'aanii* to return the parties to a state of *hozho* (being where everything is in its proper place, functioning in a harmonious relationship with everything else—sometimes

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[99] *See* Yazzie, *supra* note 36, at 180.

[100] *See* Ross, *supra* note 22, at 433–35; *see also* Bluehouse & Zion, *supra* note 7, at 336.

[101] *See* Yazzie, *supra* note 36, at 180.

[102] *See id.*

[103] *See* Bluehouse & Zion, *supra* note 7, at 331.

[104] *See* Yazzie, *supra* note 36, at 186.

[105] *See id.*

[106] *See id.* at 186–87.

[107] *See* Zion & Yazzie, *supra* note 24, at 78.

[108] *See* Porter, *supra* note 7, at 252–53.

[109] *See id.*

[110] *See* Austin, *supra* note 32, at 10.

defined simply as "beauty" or "harmony").[111] It follows that offenses and lawlessness occur when someone or something is not in harmony.[112] The *naat'aanii* helps the parties identify the source of this disharmony.[113] Once the source of the conflict is unsheathed, the *naat'aanii* then will intervene.[114] Thereafter, he will work with the parties to repair the disharmony by helping the community form an affirmative plan aimed at the goal of resolving the conflict.[115] Thus, the fourth characteristic of peacemaking appears—the peacemaker.

IV. APPLICATION OF NAVAJO PEACEMAKING ATTRIBUTES TO MODERN ANGLO-AMERICAN ADR

The excavation of the Navajo Peacemaker Court has exposed vast cultural differences between Indian and non-Indian forms of justice that, at first glance, may make the two systems appear to be incompatible.[116] However, digging deeper, beyond the differences, reveals certain treasures of peacemaking that also appeal to Anglo-American families in dispute, such as the following: continuity of relationships, extended family involvement, shared or collective responsibility, and an effective peacemaker.[117] While some academics may warn about the dangers of cross-cultural borrowing,[118] it is plausible that certain aspects of the peacemaker courts may be incorporated into the traditional ADR paradigm followed by Anglo-American cultures in the family law setting.[119]

However, critics argue that in order for peacemaking even to be considered outside of its original context, the sociology of the community involved should be similar to the homogeneity and cohesiveness displayed

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111 *See* Bluehouse & Zion, *supra* note 7, at 334.

112 *See* Austin, *supra* note 32, at 10.

113 *See* Bluehouse & Zion, *supra* note 7, at 334–35.

114 *See id.* at 335.

115 *See id.*

116 *See* Goldberg, *supra* note 8, at 1003–05.

117 *See supra* Part II.

118 *See, e.g.*, Goldberg, *supra* note 8, at 1004 (sympathizing with the idea of implementing peacemaker courts in non-Indian cultures, yet objecting to the actual practice).

119 *See* Bernard, *supra* note 8, at 821. "Peacemaking offers a vital and timely innovation in ADR processes. With careful development, tribal peacemaking can become a proving ground for the philosophical and ethical principles which undergird mediation as practiced generally in the United States." *Id.* Furthermore, the idea of incorporating peacemaking into neighborhood dispute resolution is being explored. *See id.* at 826.

by the Navajo community.[120] Because peacemaking ultimately allows the community to reach a consensus, the process is also arguably more successful when an individual within the community is the wrongdoer.[121]

Furthermore, it also has been argued that the unique religious characteristics of the peacemaker courts act as obstacles, preventing successful implementation in an Anglo-American culture that regards the law and the church as two separate entities.[122] Moreover, the argument continues, it is presumed that peacemaking will fail in an environment that does not share a common religion.[123]

While the concept of religion is most commonly recognized as "[a] belief in and reverence for a supernatural power,"[124] that is not the exclusive definition of religion,[125] and more importantly, religious homogeneity is not the reason for the success of peacemaking. It is the Navajos' zeal and devotion to repairing relationships, rather than their specific religious beliefs, that brings success to peacemaking sessions. This objective of repairing inherently continuous relationships is also present within the structure of the family regardless of the individual family member's religious beliefs.[126] Moreover, in child custody cases there is an even more tangible and unified belief than the broad goal of mending relationships.[127] Parents, judges, mediators, and guardians ad litem all will agree that the paramount goal for determining custody arrangements is an arrangement that is made with the best interests of the child in mind.[128]

Thus, absence of a common religion does not have to prove fatal in the emulation of peacemaking. With the sole inquiry centered around the child,

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[120] *See* Goldberg, *supra* note 8, at 1005 (arguing that effective peacemaking assumes certain sociological characteristics, such as a kinship network).

[121] *See* Lieder, *supra* note 72, at 16.

[122] *See* Goldberg, *supra* note 8, at 1015–16.

[123] *See id.*

[124] AMERICAN HERITAGE DICTIONARY 1044 (1982).

[125] *See id.* Rather, "religion" also can be defined as "[a]n objective pursued with zeal or conscientious devotion." *Id.* Thus, it is not necessary for the belief or objective to be religious in nature as long as it is pursued with a "zeal or conscientious devotion." *Id.*

[126] *See* Richard K. Schwartz, *A New Role for the Guardian ad Litem*, 3 OHIO ST. J. ON DISP. RESOL. 117, 117 (1987); *see also* Elizabeth A. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 630–32 (1992) (advocating postdivorce relationships that mirror the relationships developed within the intact family to provide the most stable family outcome).

[127] *See* Schwartz, *supra* note 126, at 117.

[128] *See id.* at 139. It is sometimes forgotten that custody mediation involves the child because the child is not a formal party to the action. *See id.* However, the child is an interested third-party whose interests deserve the ultimate protection. *See id.*

unity of belief is established and solidarity enhanced. Thus, the objective of what is in the best interests of the child shall provide the unity of belief that arguably presupposes successful peacemaking.

A. *The Need for Horizontal Justice*—Hozho' Sokee'

The adversary system relies upon the premise that two attorneys representing the parties in the dispute will flesh out all relevant information, thereby allowing the factfinder to determine the "truth" to make the best decision regarding the outcome.[129] While this may prove successful in most litigation settings, this system was not designed for parties that would have to cooperate with each other on a regular basis for years to come; rather, the adversary system presupposes a severing of contact between disputants after judgment.[130] For that reason, among others, the adversary system is not the atmosphere for two parents who have declared publicly their unwillingness or inability to remain married but still must cooperate with each other after the divorce.[131]

Nevertheless, the family courts traditionally have used the adversary system as the mechanism to decide various disputes concerning the fate of children after a divorce.[132] Inevitably, negative evidence surfaces at these adversary hearings, causing parents to drift further apart rather than encouraging the parents to communicate and cooperate to help minimize the trauma and anxiety for the children involved.[133] Further, "[u]ninhibited

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[129] *See generally* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984).

[130] *See* Peter Marguilies, *The Lawyer as a Caregiver: Child Client's Competence in Context*, 64 FORDHAM L. REV. 1473, 1482 (1996).

[131] *See* Kathleen Niggemyer, Comment, *Parental Alienation Is Open Heart Surgery: It Needs More Than a Band-Aid to Fix It*, 34 CAL. W. L. REV. 567, 569 (1998); *see also* Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L.Q. 95, 95 (1998) (explaining the need for family courts to find better ways to help parents and children minimize the impact of divorce).

[132] *See* Schepard, *supra* note 131, at 95. Further, the nature of the adversarial system is problematic because, inherently, one party always loses. *See* Niggemyer, *supra* note 131, at 570.

[133] *See* Schepard, *supra* note 131, at 95. The lack of cooperation after a settlement agreement made in an adversary proceeding has been noted:

> Anger and bitterness generated in conflictual negotiation or adjudication can poison the prospects of future cooperation between parents. The parties can continue the conflict, or the loser in the custody dispute can withdraw. Either outcome reduces

warfare inflames the passions of litigants and often undermines the cooperation and communication needed for post-divorce parenting."[134] This warfare has an indirect effect on the well-being of the child who is caught in the middle of the battle between the parents.[135] In other words, the existence of children during a divorce escalates the competition between the divorcing parents in the adversary setting—children become a prize for the prevailing party.[136] The courthouse is not the proper forum to assist dysfunctional families in resolving their disharmony—"[t]he hurt, frustration, anger and fear, and the loss of familiar support systems are not healed by the adversary process; instead, the parties and the children are on their own to deal with these concerns."[137] Thus, the nature of the adversary system has the effect of doing more harm than good for both parents and especially the children.[138]

> the prospects for stable family relationships in the future; both the relationship between parents and parent-child relationships are impaired by stressful, angry custody battles.

Scott, *supra* note 126, at 649.

[134] Hon. Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 11 (1990).

[135] *See* MICHAEL R. STEVENSON & KATHRYN N. BLACK, HOW DIVORCE AFFECTS OFFSPRING: A RESEARCH APPROACH 42 (1996).

[136] *See* Niggemyer, *supra* note 131, at 570. When children become the prize, the end result becomes parental alienation—"a process by which one parent consciously tries to divide the child, to pry the child loose from involvement with the other parent." *Id.* at 567–68.

[137] Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 108 (1997). Further, on the personal stress index, divorce ranks second only to death of a loved one. *See* CONSTANCE AHRONS, THE GOOD DIVORCE: KEEPING YOUR FAMILY TOGETHER WHEN YOUR MARRIAGE COMES APART at ix (1994).

[138] *See* Schepard, *supra* note 131, at 95. The National Institute of Child Health and Human Development summarizes the emotional problems that surface throughout the entire divorce process:

> Most family members experience substantial psychological and emotional disturbance around the time of divorce, although this is sometimes mixed with more positive feelings, especially when there is relief regarding the resolution of the problems leading to divorce. Whatever the antecedents, family dissolution is clearly disruptive for mothers, fathers, and children, most of whom experience varying degrees of distress, depression, loneliness, regret, lack of control, helplessness and anger. These psychological symptoms are not simply acute responses to immediate stress. For many families, symptoms are still at peak levels a year or two after separation, and there is wide variability in the length of time most individuals take to achieve a new equilibrium. Preoccupation with their own emotional turmoil clearly limits parents' abilities to support their children emotionally and enforce consistent expectations and demands.

Moreover, there has been an even greater need for cooperation and communication between divorced parents with the recent trend of awarding joint custody of the children.[139] However, many critics of joint custody arrangements question whether it is realistic to assume that divorced parents can put the failed marriage behind them and cooperate in the interest of their children.[140] Again, in the context of child custody disputes, this indicates the dire need for an alternative to the adversarial system that is sensitive to these concerns and characteristics unique to the family.[141]

In response to the criticisms of the use of the adversary system in this context, some jurisdictions are promoting ADR programs such as mediation when deciding matters affecting children.[142] Mediation may be invoked on a

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Michael E. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 394–95 (1997) (reproducing statement of consensus by experts in psychology, law, and social welfare).

[139] *See* Schwartz, *supra* note 126, at 117. Joint custody is becoming more widely accepted. *See* Elizabeth Scott & Andre Derdenyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 456–57 (1984). It gives both parents at all times legal custody, which is the legal authority and responsibility for making major decisions about the child's welfare, and it alternates physical custody as needed. *See id.* The majority of states have adopted statutes that expressly authorize some form of "joint custody" award. *See id.* Those statutes come in the following three basic forms: joint custody as an option where the parties petition or agree, as an option regardless of agreement, and as a presumption or a preference. *See id.* at 457.

[140] *See* Schwartz, *supra* note 126, at 118. This is because joint custody arrangements demand flexibility due to changing circumstances and needs within a dynamic family. *See id.* at 124. Minor changes in schedules, finances, or everyday decisions for the child's future—"little monsters"—have the potential to turn into what the Navajos would call *nayee*. *See id.* Thus, parents involved in joint custody arrangements constantly must adapt and cooperate with the modifications or face the dreaded adversary system. *See id.* at 125.

When cooperation is not chosen, the modification proceeding that follows in the courthouse is nothing close to the once unified goal of determining what is in the best interests of the child. *See id.* at 127. Parents may have entered the courthouse seeking only a modification to the original joint custody order. *See id.* However, that is hardly the result. *See id.* Because the court previously has determined that the joint custody arrangement was in the best interests of the child, the parent must be determined unfit. *See id.* Thus, the conflict and acrimony escalate. *See id.*

[141] Further, the Honorable Robert Yazzie, Chief Justice of the Navajo Nation, believes that this dissatisfaction with the adversary system is because, "'[i]mposed methods which are not in harmony with people's notions of right and wrong do not enforce right or deter wrong.'" Bernard, *supra* note 8, at 831 (1996) (quoting ROBERT YAZZIE, THE NAVAJO PEACEMAKER COURT: CONTRASTS OF JUSTICE 4 (1992)).

[142] *See* Susan L. Brooks, *A Family Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y 1, 16–17 (1996). So far, mediation has

voluntary basis, though many courts now are insisting that parties attempt to mediate and treat litigation as a last resort.[143] Mediation in the child custody setting has been given accolades for emphasizing cooperative decisionmaking in the presence of a third party, yet there is still room for improvement.[144] Similar to peacemaking, cooperative decisionmaking is facilitated by giving the parents the opportunity to talk things out and the opportunity to voluntarily agree to a solution—family group decisionmaking.[145] Therefore, with similar characteristics such as continuous relationships, involvement of extended family members, and shared responsibility, the Anglo-American family provides the necessary foundation for implementing successful peacemaking programs.

B. *Continuous Relationships*—K'ei

Critics of cultural borrowing argue that "the kind of balance, harmony, and healing that the peacemakers strive to achieve" within the clan structure of the Navajo community is absent in modern American culture.[146]

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been the prominent vehicle urged for assisting parents in resolving joint custodial disputes as well as reaching custody and visitation settlements. *See* Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian* ad Litem *in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 282 (1998).

[143] *See* Lidman & Hollingsworth, *supra* note 142, at 282.

[144] *See* Susan Zaidel, *Ethical Issues in Family Law*, 12 MED. & L. 263, 267 (1993). Research has shown that mediated divorces result in a higher proportion of shared parenting arrangements, more stable relationships between children and their noncustodial parents, and a higher rate of fulfillment of child support obligations. *See id.*

[145] *See generally* Joan Pennell & Gale Burford, *Widening the Circle: Family Group Decision Making*, 9 J. CHILD & YOUTH CARE 1 (1994). New Zealand utilizes a family group decisionmaking approach as an ADR mechanism in child custody disputes. *See* MARK HARDIN, FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE OF NEW ZEALAND 3–5 (1996). Similar to the extended zone of dispute in the peacemaking setting, the family group in New Zealand consists of extended family members and close friends. *See id.* at 3. The family group meets privately and together they decide if the child has been abused or neglected. *See id.* at 4. This praised practice of cooperative decisionmaking sometimes is called "therapeutic justice"—"it concentrates on empowering families with skills development [and] assisting them in resolving their own disputes." Jeffrey A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 67, 68 (1998). Thereafter, the family group assumes the responsibility for identifying the problem and will develop a plan to protect the child. *See* HARDIN, *supra*, at 3–5.

[146] Goldberg, *supra* note 8, at 1016.

Therefore, the argument continues, incorporating peacemaking into the Anglo-American ADR regimen would be futile absent similar kinship bonds among the various members of society.[147] While Anglo-Americans, in the aggregate, may not represent a homogenous clan bound by similar morals, beliefs, and traditions, the Anglo-American culture is not completely void of kinship bonds.[148] Similar to a clan, the Anglo-American family provides a systemic structure in which balance, harmony, and healing are goals of its members, bound together by a continuous relationship.[149] Quite simply, the Anglo-American family is a distinct entity made up of individual members who are the interacting parts of a living system.[150] Each individual within the Anglo-American family is basically a member of an ascertainable clan, consisting of various individuals occupying distinct roles within the family.[151] These distinctive roles define the various obligations and relationships between each member within the family, providing many forms of support and security.[152] Further, like clan members, family members

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[147] *See id.*

[148] *See* Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 779–80 (1997) (discussing the intricate support systems and the many functions performed by the American family).

[149] *See* Brooks, *supra* note 142, at 7 (explaining the importance of families striving to maintain stability by remaining dynamic and adapting to modification without disrupting the essential continuity of the system); *see also* URIE BRONFENBRENNER, THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN 7–8, 25 (1979) (discussing the kinship bonds and relationships of family members).

[150] *See* Brooks, *supra* note 142, at 4. Moreover, this broad definition of family includes those individuals who share or seek to share intimate relationships with each other. *See id.* Thus, even certain neighbors and friends may be included in this definition as long as the relationship of intimacy is present. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 904 (1984).

Further, this definition of "family" is part of a larger "family systems approach" that will be utilized throughout this Note. Brooks, *supra* note 142, at 3. The family systems approach has been developed in a vast amount of literature and has achieved wide acceptance in the mental health fields—social work, psychology, and psychiatry. *See id.* For an in-depth discussion of family systems theories and concepts, see generally SALVADOR MINUCHIN, FAMILIES AND FAMILY THERAPY (1974); JASON MONTGOMERY & WILLARD FEWER, FAMILY SYSTEMS AND BEYOND (1988).

[151] *See* DAVID KNOX & CAROLINE SCHACHT, CHOICES IN RELATIONSHIPS: AN INTRODUCTION TO MARRIAGE AND THE FAMILY 18 (1994). Moreover, "[t]he basic social unit of almost all human populations is the family." *Id.* at 19. Within the family are various roles and relationships which grow and change with the transformation of the family structure. *See* Babb, *supra* note 148, at 779.

[152] *See* Babb, *supra* note 148, at 779.

actively participate and are often even bound by rituals which encourage harmonious relationships both inside and outside of the family structure.[153] In turn, each of these unique characteristics of the family has created a shield of autonomy that, to a certain degree, has insulated the family from public regulation and control; thus, each family appears to represent a distinct community bound by its own laws.[154]

Unfortunately, *nayee* also plagues the Anglo-American family system and frequently the end result is divorce.[155] Just as after two clan members have a dispute they still remain a clan, after a divorce a family still will remain a family—it was only the marriage that was extinguished, not the entire family system. Research indicates that the best thing for children after a divorce is to have a continuing and regular relationship with all family members.[156] Nonetheless, the adversary system does nothing to help heal the broken relationships or promote healthy future interactions within this broken family.[157] Even looking beyond the unsuccessful outcome, mere participation in the adversary process heightens the conflict and actually enhances the damage to all parties involved.[158] Thus, similar to a dispute among clan members, child custody disputes inherently involve parties that will have an infinitely continuous relationship—even after the circle is

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[153] *See id.* Further, the family is the haven for emotional and spiritual support of its members. *See* PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 19 (1977) (noting that within the family, members "make their moral commitments, invest their emotions, plan for the future, and perhaps even hope for immorality"). Furthermore, family rituals increase the expectation of stability in the family and give the members a private institution to retreat from general society. *See id.*

[154] *See* David J. Herring, *Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes*, 5 S. CAL. INTERDISC. L.J. 205, 221 (1997) (noting that the protected association of the family provides for a high degree of governmental restraint in control and regulation of the family system).

[155] In 1990, there were 2,400,000 marriages to 1,200,000 divorces—the ratio was only 2 marriages for each divorce. *See* STEVENSON & BLACK, supra note 135, at 5. Thus, there is a divorce in America about every 13 seconds. *See* AHRONS, *supra* note 137, at ix. Approximately 35% of minor children in the United States experienced the divorce of their parents in the 1980s and 1990s. *See* STEVENSON & BLACK, *supra* note 135, at 6.

[156] *See* DONALD T. SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES 127 (1983). *See generally* DAVID L. LEVY, THE BEST PARENT IS BOTH PARENTS (1993).

[157] *See* Weinstein, *supra* note 137, at 122–25.

[158] *See id.* at 123–24. Delays and uncertainty cause great anxiety and stress for both parents and children. *See id.* at 124. In addition, this stress inevitably will detract the parents' attention from the children at a time when they need it the most. *See id.* Ironically, the system and set of legal protection that was created in effort to protect the children ultimately is bringing great pain to children. *See id.*

broken.[159] Therefore, the Anglo-American family shares many of the characteristics best suited for a dispute resolution program which focuses on the continuation of social relationships within a community.

C. *Involvement of Extended Family*

As well as continuing relationships with both divorced parents, the family preservation movement promotes continuing family ties with all members of a child's kinship network after a divorce.[160] Basically, the goal of family preservation is to help the child achieve and maintain close emotional ties with all members of the family by preserving as much of the family system as possible.[161] Moreover, this proposition is supported by extensive research indicating that children need to sustain their attachments to their extended families even when the family system breaks down and when the biological parents no longer live together.[162] Grandparents, aunts, uncles, and cousins all provide essential functions to help provide children with a loving and supportive environment.[163]

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[159] *See* Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38, 42–43 (1994). In virtually all domestic relations cases, especially those involving children, the parties involved must continue to deal with each other long after the dispute is resolved. *See id.* Peacemaking is thought to work best in these types of situations in which there is the goal of preserving relationships. *See id.*

[160] *See* Brooks, *supra* note 142, at 8. For a discussion on the family preservation movement, see Anthony N. Maluccio et al., *Protecting Children by Preserving Their Families*, 16 CHILDREN & YOUTH SERVS. REV. 295, 296–97 (1994), and Duncan Lindsey, *Family Preservation and Child Protection: Striking a Balance*, 16 CHILDREN & YOUTH SERVS. REV. 279, 283 (1994).

[161] *See supra* note 154 and accompanying text. Further, research supports a need for children to continue their attachments with many individuals to encourage healthy development. *See generally* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996). Attachment theorists have found that children form important different attachments to different people. *See id.* at 349 n.11. It consistently has been found that even abused children maintain attachments to their original caregivers. *See id.*

[162] *See* Brooks, *supra* note 142, at 18 (discussing the empirical evidence that emphasizes the importance of the relationships within a biological family); *see also* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 163 (1992).

[163] *See* Joan C. Bohl, *Family Autonomy vs. Grandparent Visitation: How Precedent Fell Prey to Sentiment in* Herndon v. Tuney, 62 MO. L. REV. 755, 776 (1997) (including grandparents in the definition of a "family unit"); Alissa M. Wilson, Note, *The Best Interests of Children in the Cultural Context of the Indian Child Welfare Act in* In re S.S.

In addition, the importance of maintaining connections with extended family members has been recognized by several courts in the context of child custody determinations—a child should not be deprived of the opportunity to maintain contact with individuals with whom the child has developed strong ties.[164] While the courts have considered the extended family as the primary factor only in cases dealing with the Indian Child Welfare Act, several courts explicitly have given some weight to the extended family when considering the "continuity" factor in custody determinations.[165] Thus, the legislature's decision to include the extended family as a factor in custody disputes indicates the importance of allowing the extended family to participate in child custody determinations.[166] Therefore, child custody disputes are ideal candidates for peacemaking programs which strive to restore the harmony among the entire family system.

D. *Shared or Collective Responsibility*

In this situation of continuing relationships, in order to intervene and help the child, one must "treat" the entire family system collectively.[167] Further, this mutual interaction among family members establishes a type of shared responsibility within all members when a disruption occurs.[168] Thus, the problem that caused the disruption belongs to the entire family rather than just one individual.[169] In other words, responsibility is evenly distributed among all family members regardless of which member exhibited

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and R.S., 28 LOY. U. CHI. L.J. 839, 841 (1997) (discussing the familial obligations of the extended family in raising children).

[164] *See* Linda K. Thomas, Note, *Child Custody, Community and Autonomy: The Ties That Bind?*, 6 S. CAL. REV. L. & WOMEN'S STUD. 645, 660 (1997).

[165] *See id.*; *see also* ARIZ. REV. STAT. ANN. § 25-402 (West Supp. 1996); OR. REV. STAT. § 107.137(1)(a) (1989) (mandating consideration of the "emotional ties between the child and other family members"); VT. STAT. ANN. tit. 15, § 665(b)(7) (1989) (mandating consideration of "the relationship of the child with any other person who may significantly affect the child"); VA. CODE ANN. § 20-124.3 (Michie 1995) (mandating consideration of the "needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members"); WIS. STAT. ANN. § 767.24(5)(c) (West 1993).

[166] *See* Thomas, *supra* note 164, at 677.

[167] Brooks, *supra* note 142, at 9 (discussing the concept of collective responsibility).

[168] *See id.* at 5; *see also* Richard D. Mathis & Lynelle C. Yingling, *Family Modes: A Measure of Family Interaction and Organization*, 36 FAM. & CONCILIATION CTS. REV. 246, 247 (1998).

[169] *See* MONTGOMERY & FEWER, *supra* note 150, at 37–40 (discussing the concept of shared responsibility within the family system).

the behavior, because the conduct of one member is enough to disrupt the harmony of the entire family system.[170] Thereafter, the family must seek to restore balance and begin healing.[171] Thus, similar to the Navajo clan, the Anglo-American family is bound by a solidarity that mirrors the concept of *k'e*. Only a dispute resolution that recognizes this form of shared responsibility will lead to effective healing for the psychological problems that invariably follow a family after divorce.[172]

E. *The Peacemaker*— Naat'aanii

The role of the mediator varies greatly in Anglo-American negotiation settings.[173] Typically, a trained third party acts as the mediator who meets with disputants and attempts to assist them in problem-solving in an impartial manner with confidentiality.[174] Thus, a qualified peacemaker, or *naat'aanii*, must be selected and invited into the circle to help mend the family system.

However, even with the focus on the children in Anglo-American child custody mediation, rarely do the mediators even meet with the children.[175] While the mediator of these disputes traditionally has been a neutral third

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[170] *See id.* Moreover, the emotional health of children has been found to be a by-product of the emotional health of their parents. *See* Schwartz, *supra* note 126, at 120–21. Interpersonal family dynamics are highly relevant in developing a child's coping skills with respect to her parent's change in marital status. *See* E. Mavis Hetherington, *Coping with Transitions: Winners, Losers, and Survivors*, 60 CHILD DEV. 1, 1 (1989). Furthermore, studies show that the negative consequences in children due to parental divorce subside within two or three years of the divorce if the stress between family members also ends. *See id.*

[171] *See* Babb, *supra* note 148, at 780–83 (discussing various approaches to heal families that face various crises, such as divorce, custody, support, and family violence).

[172] *See generally* JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) (examining numerous studies on the psychological problems that accompany divorce).

[173] For a general background of the mediation process and the role of the mediator, see Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 5–8.

[174] *See id*; *see also* MODEL STANDARDS OF CONDUCT FOR MEDIATORS Std. 2 (American Arbitration Ass'n et al. 1998) (receiving the approval of the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution).

[175] *See* Lindman & Hollingsworth, *supra* note 142, at 283 (noting that it is less common for the child to be involved in the mediation, but it has been suggested by several commentators).

party, recent proposals suggest there may be a more qualified person for the position of returning the family back to harmony—*hozho*.[176] In the area of custody disputes, the guardian ad litem[177] may be the person who deserves this invitation because the guardian ad litem is in the best position to facilitate a settlement.[178]

The guardian ad litem, who traditionally acts as the child's advocate, will keep the mediation focused at all times on the best interests of the children.[179] It is the guardian ad litem who is familiar with the special needs and situation of each child.[180] Furthermore, the guardian ad litem has the ability to perform "crisis mediation," or subsequent unexpected mediations, in the event of changed circumstances, rather than hauling the parties back on the docket to rehash the modification.[181] Providing the best perspective, the guardian ad litem appears to be in the best position to guide the family back to *hozho*.

V. RECOMMENDED PEACEMAKING GUIDELINES IN THE FAMILY SYSTEM

The Anglo-American family system provides the unique foundation for peacemaking programs should disputes and conflicts arise between members in the context of child custody determinations. Thus, a successful peacemaking program for the Anglo-American family should contain four basic characteristics, as follows: (1) continuous relationships, (2) the involvement of the extended family, (3) shared or collective responsibility, and (4) the peacemaker—the guardian ad litem.

First, the concept of perpetuating continuous relationships with the child should at all times be emphasized. The postdispute relationships should be extensions of the relationships prior to the conflict. It is important for the

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[176] *See* Schwartz, *supra* note 126, at 117.

[177] Guardians ad litem are defined by statute. *See* Charles T. Cromley, Jr., Comment, "*As Guardian ad Litem I'm in a Rather Difficult Position*," 24 OHIO N.U. L. REV. 567, 576 (1998). Basically, a guardian ad litem is a court appointed advocate of the child's best interests. *See id.* The role and duties of the guardian ad litem differ drastically. *See id.*

[178] *See* Schwartz, *supra* note 126, at 163; *see also* Cok v. Costantino, 876 F.2d 1, 3 (1st Cir. 1989) (stating that "guardian ad litem[s] are non-judicial persons fulfilling quasi-judicial functions").

[179] *See* Schwartz, *supra* note 126, at 164.

[180] *See id*; *see also* Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1800 (1996) (suggesting that guardians ad litem act in loco parentis).

[181] Schwartz, *supra* note 126, at 165.

child to maintain the different attachments and relationships with the various individuals throughout his life. These relationships should evolve naturally throughout time and not ever be cut off abruptly by something outside the control of the child, such as a divorce. Thus, this characteristic was inspired by the Navajo emphasis on continued relationships within the clan system.[182]

Second, the family system should be broadly defined and identified. It may include extended family members, such as grandparents, aunts, uncles, and close family friends, even if they are not blood relatives. The common denominator is not the lineage of heredity to the child; rather, what is important is to include all individuals who have intimate attachments to the child within the family system. These individuals make up the support group for the child and represent internal stability within the family system when there is conflict. Thus, the characteristic of an "extended zone of dispute" should be borrowed from the Navajo peacemaking process.[183]

Third, this family system must share in the responsibility of the conflict which occurs within the family. Problems within the family system belong to the entire family system and not just one individual—blame will not attach to any one particular person. It must be recognized that all members play a role in perpetuating the destructive behaviors that exist within a family system. Thus, the entire extended family system should have a role throughout the peacemaking process. All members should be allowed to express their concerns and views with respect to the problem. Together, they shall formulate a plan to restore harmony in the system. This characteristic mirrors the Navajo process of talking things out in accord with the traditional Navajo system of "horizontal justice."[184]

Fourth, an effective peacemaker should act as a guide to help the family system restore harmony. In the child custody setting, the guardian ad litem appears to be the wisest guide to act on behalf of the child at all times. This child advocate will help protect the child from being used as a pawn in a battle between two dueling parents. Moreover, many of the same characteristics that constitute a successful tribal peacemaker also would be favorable characteristics for an Anglo-American peacemaker to possess in the family dispute resolution setting.[185]

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[182] *See supra* Parts III; IV.B.

[183] *See supra* Parts III; IV.C.

[184] *See supra* Parts III; IV.D.

[185] *See supra* Parts III; IV.E.

VI. CONCLUSION

This quest began in search of "new discoveries" to improve the realm of alternative dispute resolution. In the first phase of the project, Navajo peacemaking was "discovered" as an alternative to adjudication. However, the discoveries made during this excursion cannot in good faith be labeled "new." Navajo peacemaking was "discovered"—not as the innovative creation it sometimes is portrayed to be, but as an original form of tribal justice, once suppressed by those who currently advocate its assimilation.

Further, while critics may believe that characteristics of the Navajo community and Anglo-American families are mutually exclusive, similarities are in fact present, allowing certain analogies to be drawn. Furthermore, based on some of these similarities, aspects of Navajo peacekeeping always have been present in the context of family dispute resolution programs. The recommendations made in this Note only purport to enhance these characteristics in the hope of a more compassionate process of resolving disputes unique to the various family systems throughout society. Therefore, although it may have taken an excavation to uncover the Navajo Peacemaker Court and the manner in which its basic tenets may improve Anglo-American family dispute resolution programs, it is important to note that these new discoveries actually have been here all along—waiting to be "suddenly seen."